NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211057

CAROLYN E. CONNER,
EMPLOYEE — CLAIMANT

BAPTIST HEALTH,
SELF-INSURED EMPLOYER — RESPONDENT

OPINION FILED DECEMBER 13, 2006

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GAIL PONDER GAINES, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal and claimant cross appeals an opinion and order of the Administrative Law Judge filed January 9, 2006. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. There was a compensable September 10, 2002, injury.

2. The compensation rates are $280/210.

3. Respondents accepted a 5% permanent impairment rating to the shoulder.

4. The claimant has proven by a preponderance of the evidence that additional medical treatment is reasonable and necessary.

5. Respondents are liable for all reasonable and necessary medical the claimant has pursued.

6. The preponderance of the evidence supports the claimant’s contention that the medical was controverted in May 2005.

7. The claimant has proven by a preponderance of the evidence that she has sustained a 20% diminished wage earning capacity over the 5% impairment rating.

8. The claimant’s attorney is entitled to the maximum attorney’s fee provided by Ark. Code Ann. § 11-9-715 and Arkansas Workers’ Compensation Rule 10.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the January 9, 2006 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant’s injury occurred after July 1, 2001, the claimant’s attorney’s fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing in part on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of $500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant is entitled to

additional medical treatment as well as a 20% loss in wage earning capacity over and above her anatomical impairment rating. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant was employed by the respondent employer as a certified nursing assistant. On September 10, 2002, the claimant sustained an admittedly compensable injury to her left shoulder. The claimant was pulling a patient up in her bed when she hurt her left shoulder. The claimant immediately reported the injury and began treatment. The claimant ultimately had shoulder surgery performed by Dr. John Yocum on January 13, 2003. She then asked to see a neurosurgeon for her neck and was sent to Dr. James Adametz. After Dr. Adametz did not recommend treatment, the claimant requested and obtained a Change of Physician through the Commission to Dr. Steven Cathey. Dr. Cathey also did not recommend treatment. After Dr. Yocum released the claimant from his care for her shoulder, the claimant requested and obtained another Change of Physician through the Commission to UAMS for further treatment of her shoulder.

Dr. Yocum provided the claimant with a limited duty work release. She worked one day, June 13, 2003, from 8:00 a.m. until shortly before her shift ended at 4:00 p.m. when she left and went to the emergency room complaining of pain. The claimant had been placed in the job of wrapping silverware in the kitchen where she took three pieces of silverware and a napkin and put them in a plastic bag. The claimant was terminated from employment with the respondent employer after she refused to continue with an alternate work duty assignment.

The claimant is 50 years old, has a GED, attended Capitol City Junior College, where she took secretarial courses and was on the honor roll, completed and obtained a certificate from Carter Barber College, and completed Baptist Health CNA school. She has a home computer which she uses for finances and personal correspondence. The claimant testified that she did not want to pursue secretarial work, but acknowledged that she had made no inquiries concerning a secretarial job. The claimant is the sole caretaker for her three grandchildren, ages 2, 3, and 6. She acknowledged that if she was not taking care of them there would not be

anybody else and that not working has allowed her the freedom to care for them.

The claimant initially denied that she had suffered prior neck and shoulder problems or that she had a prior workers' compensation claim. Medical records indicate the claimant sustained a left shoulder strain in April 1986, a fall at work in October 1987, a neck and left shoulder injury in a motor vehicle accident in September of 1993, and ongoing treatment for bilateral shoulder and neck sprains in 1996 and 1997 following another motor vehicle accident.

Ms. JoAnn Crowe, case manager for the respondent employer, testified that she talked to the supervisor to define the claimant's limitations. In response to this offer, the claimant acted like it was demeaning to work in the kitchen. Ms. Crowe disputed the claimant's testimony that the job wrapping silverware would have required her to lift 30 to 40 pound trays of silverware. Ms. Crowe further testified that had the claimant followed through with this bonafide offer of a 12-week temporary assignment to wrap silverware, then there would have been other opportunities that would lead to a permanent job.

Gwen Wetzel, the respondent employer’s manager of staffing and employee relations and workers’ compensation administrator, testified that the claimant had telephoned her upset because Dr. Yocum had given her a limited return to work release and the claimant wanted him to sign papers that she was permanently disabled and wanted the respondent employer to back her in that request. Ms. Wetzel testified that throughout the process the claimant did not indicate that she wanted to come back to work for the respondent employer.

Dr. Adametz noted that the claimant had had trouble with her neck and back since 1997. He felt she did not have a surgical condition and that she needed heat and muscle relaxers. He did not provide work restrictions.

The claimant then obtained a Change of Physician Order and was evaluated by Dr. Steven Cathey. Dr. Cathey did not recommended neurosurgical intervention and could not identify any objective evidence of impairment to the claimant’s cervical spine related to her work related injury.

After another Change of Physician Order, the claimant came under the care and treatment of physicians at the University of Arkansas for Medical Sciences

(UAMS). The claimant complained of pain. She was found to have mild tenderness but no obvious atrophy and full passive range of motion. She was provided Lidocaine and Cortisone injections and medications. UAMS physicians ultimately elected to "control[ling] her pain with medical management [drugs]."

At the respondents' request, the claimant was evaluated by Dr. Annette Meador. Dr. Meador noted that the claimant told her as soon as she walked in the door that she was not interested in any kind of injection therapy despite the fact that Dr. Meador felt the claimant had not had the type of injections she was recommending. Dr. Meador then noted:

> However, since she has a very negative outlook on any further injections, I do not see any point in pursing these. A response to trigger point injections requires a patient attitude of hopefulness toward improvement, which is revealed in their efforts to continue to do exercises. Injections alone will not lower the pain level unless the patient is willing to place the joint in positions of stretch, which she has already told me she is not willing to do either.

Dr. Meador further noted that the claimant's "distracted" range of motion was improved and given the noted lack of atrophy some two years after the injury, Dr. Meador felt she was actually using the arm more than she admitted. Dr. Meador felt the claimant was at

maximum medical benefit and agreed with Dr. Yocum's restrictions.

The claimant was then referred for a Functional Capacity Evaluation. The examiner noted the claimant gave unreliable and inconsistent effort. The report stated:

> Ms. Conner's true functional limitations remain unknown due to inconsistent effort. She did not put forth a willingness to attempt many tasks, even those unrelated to her affected region. The abilities she exhibited during formal testing would not be enough to drive an automobile yet she did drive to and from the evaluation. This again indicates that her actual abilities are much higher than those exhibited.

The parties deposed Dr. Yocum, the claimant's shoulder surgeon, for clarification on some of his opinions. Dr. Yocum testified that he performed surgery to repair the rotator cuff tendon and for removal of spurring of the AC joint which was a degenerative condition that had developed over the course of time. In response to the bases for permanent restrictions he placed, Dr. Yocum testified, "Well, I guess given the best possible results following rotator cuff surgery in this scenario, one would expect that overhead lifting might be something that would be uncomfortable for this patient and that there would be some pain associated

with that. So that kinda guides the restrictions.” He indicated that the restriction of no overhead lifting referred to no repetitive overhead lifting but that some overhead lifting was okay. Likewise, the restriction of no lifting greater than five pounds was on a repetitive basis and below shoulder lifting of greater than five pounds might occasionally be okay. Dr. Yocum opined that anyone who had a rotator cuff repaired would be ill advised to engage in an occupation that required repetitive overhead activities and a lot of lifting with the extremity both based on pain and a risk of re-injury. At the time Dr. Yocum released claimant, he felt she would benefit from a continuing home exercise program. He indicated the claimant should avoid continued narcotic pain medication use on a long term bases. Dr. Yocum testified notations by subsequent physicians at UAMS that the claimant had no obvious atrophy might suggest that she had been using the shoulder to some extent and commented that the UAMS note that she could go through full passive range of motion was a good sign that she had good flexibility in her shoulder joint.

Employers must promptly provide medical services which are reasonably necessary for treatment of

compensable injuries. Ark. Code Ann. § 11-9-508(a)(Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

In my opinion, it appears that the claimant only wants to take pain medications. She is unwilling to undertake the more difficult aspects of medical treatment which are necessary for her condition to improve. It simply is not reasonable and necessary to provide pain medication for someone who is unwilling to participate in further treatment recommendations which the medical specialists opine are necessary to achieve improvement. Accordingly, I find that the claimant has

failed to prove by a preponderance of the evidence that she is entitled to additional treatment.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained

permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant’s age, education, and work experience. Emerson Electric v. Gaston, supra.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

The Commission may use its own superior knowledge of industrial demands, limitations, and

requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Repl. 2002) provides:

> (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
>
> (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning

capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

In my opinion, the claimant is not entitled to any wage loss disability benefits over and above the 5% permanent anatomical impairment rating accepted by the respondents for her shoulder injury. The claimant has been evaluated by at least five specialists and has been assigned a 5% permanent anatomical rating. The claimant demonstrates a total lack of motivation to return to any type of employment. This is evident by the claimant’s own testimony where she stated that she was the sole caregiver for her three grandchildren and that there would be no one else to do it if she was not at home. Moreover, the claimant was given a light duty job for the respondent employer where she wrapped one knife, one fork and one spoon and one napkin in plastic bag. After one day on that job, the claimant went to the emergency room and said she hurt too bad to work. She never returned to that job which was available to her for her regular pay for 12 weeks. She never followed up on any additional job opportunities with the respondent employer.

The evidence demonstrates that the claimant has a GED, has obtained barber certification, has CNA certification and has also performed light assembly manufacturing work. She uses her home computer for finances and personal correspondence. However, the claimant has testified that she is unwilling to pursue a job in the secretarial field. The evidence, in fact, demonstrates that she has failed to even pursue any employment whatsoever. Although Dr. Yocum has limited the claimant and precluded her from working as a CNA, the claimant is restricted only to repetitive overhead work and repetitive lifting of no greater than five pounds. Dr. Yocum, Dr. Meador and the UAMS physicians have noted that the claimant's lack of atrophy and good passive range of motion indicates that she was actually using her shoulder more than she realized or admitted. Furthermore, the functional capacity evaluation demonstrated that the claimant have inconsistent effort and attitude.

Simply put, the claimant lacks motivation to return work. She does not choose to utilize any secretarial skills or even attempt light or sedentary work. The claimant is content to sit at home taking care of her three grandchildren and drawing disability

benefits. In my opinion, the claimant's lack of motivation precludes her from recovering any wage loss disability benefits in addition to her 5% permanent anatomical impairment rating.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

____

KAREN H. McKINNEY, Commissioner